No. 02-634

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Supreme Court of the United States

GREEN TREE FINANCIAL CORP. A/K/A GREEN TREE ACCEPTANCE CORP. A/K/A GREEN TREE FINANCIAL SERVICES CORP. A/K/A CONSECO FINANCE CORP.,

Petitioners,

v.

LYNN W. BAZZLE AND BURT A. BAZZLE, In A Representative Capacity On Behalf Of A Class And For All Others Similarly Situated; DANIEL B. LACKEY, GEORGE BUGGS and FLORENE BUGGS, In A Representative Capacity On Behalf Of A Class And For All Others Similarly Situated,

Respondents.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF OF AMICI CURIAE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.; NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM; NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES; AND WOMEN EMPLOYED IN SUPPORT OF RESPONDENTS

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Table of Contents

STATEMENT OF INTEREST 1
SUMMARY OF ARGUMENT 3
ARGUMENT 5
A. The South Carolina Supreme Court's Decision Respects this Court's Precedents Under the Federal Arbitration Act and, Accordingly, Is Not Subject to Further Review 5
B. The FAA Provides No Default Rule Prohibiting Class Arbitration And Which Supersede State-Law Principles Of Contract 9
C. Independently of State Contract Law, the FAA Authorizes Only a Simple Change of Forum, Without the Loss of Any Substantive Right 12
D. Some Claims Require Class Treatment to Vindicate Statutorily Protected Substantive Rights 16
1. Class Litigation Is Sometimes Essential to the Enforcement of the Civil Rights Laws 16
2. Some Claims Are Too Small to Litigate Effectively on an Individual Basis, Even With the Benefit of Fee Award..... 19
3. If a Claim Cannot Be Litigated on a Class Basis in Arbitration, and if Class Treatment is Important to the Prosecution of the Claim, as in Civil Rights and Small-Recovery Cases, Claimants Must Be Allowed to Litigate Their Claims in Court 22
CONCLUSION 23

Table of Authorities

1. Cases

Adkins v. Labor Ready, Inc.,
303 F.3d 496 (4th Cir. 2002) 15
Allied-Bruce Terminix Cos., Inc. v. Dobson,
513 U.S. 265 (1995) 5, 6
Allison v. Citgo Petroleum Corp,
151 F.3d 402 (5th Cir. 1998), *reh'g denied with explanation*, 151 F.3d 434 (5th Cir. 1998) 18
Amchem Products, Inc. v. Windsor,
521 U.S. 591 (1997) 19
Ameron, Inc. v. U.S. Army Corps of Engineers,
787 F.2d 875 (3d Cir. 1986), *approved on rehearing*, 809 F.2d 979 (3d Cir. 1986), *cert. dismissed*, 488 U.S. 918 (1998) 18
Bailey v. Ameriquest Mortg. Co.,
No. CIV. 01-545 (JRT/FLN),
2002 WL 100391, 145 Lab. Cas. ¶ 34,473
(D. Minn. Jan 23, 2002) 14
Barnes v. Gorman,
122 S. Ct. 2097 (2002) 7
Bazzle v. Green Tree Financial Corp.,
351 S.C.244, 569 S.E.2d 349 (2002) 5, 7, 8, 9, 11
Bresgal v. Brock,
843 F.2d 1163 (9th Cir. 1987) 18
Brooks v. Travelers Insurance Co.,
297 F.3d 167 (2d Cir. 2002) 15
Brown v. Trustees of Boston University,
891 F.2d 337 (1st Cir. 1989),
cert. denied, 496 U.S. 937 (1990) 18
Butler v. Dowd,
979 F.2d 661 (8th Cir. 1992),
cert. denied, 508 U.S. 930 (1993) 18

Califano v. Yamasaki,
442 U.S. 682 (1979) 12, 18
Celestine v. Petroleos de Venezuela SA,
266 F.3d 343 (5th Cir. 2001) 18
Central Wesleyan College v. W.R. Grace & Co.,
6 F.3d 177 (4th Cir. 1993) 11
Circuit City Stores, Inc. v. Adams,
532 U.S. 105 (2001) 6
Circuit City Stores, Inc. v. Adams,
279 F.3d 889 (9th Cir. 2002) 15
Cooper v. Federal Reserve Bank of Richmond,
467 U.S. 867 (1984) 17
Daar v. *Yellow Cab Co.*,
67 Cal. 2d 695, 433 P.2d 732 (Cal. 1967) 21
Deposit Guaranty Nat'l Bank v. Roper,
445 U.S. 326 (1980) 19
Doctor's Associates, Inc. v. Casarotto,
517 U.S. 681 (1996) 6, 10
EEOC v. Waffle House, Inc.,
534 U.S. 279 (2002) 10, 12, 19
Ferguson v. Countrywide Credit Industries, Inc.,
298 F.3d 778 (9th Cir. 2002) 15
First Options of Chicago, Inc. v. Kaplan,
514 U.S. 938 (1995).....6, 9
Franks v. Bowman Transportation Co.,
424 U.S. 747 (1976) 17
Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) 11, 13, 14, 16
Graniteville Co. (Sibley Division) v. EEOC,
438 F.2d 32 (4th Cir. 1971) 18
Green Tree Financial Corp.-Ala. v. Randolph,
531 U.S. 79 (2000) 8, 10, 11, 12, 14 15
Hines v. Davidowitz,
312 U.S. 52 (1941) 10
Hollon v. Mathis Independent School District,
491 F.2d 92 (5th Cir. 1974) 18

Hooters of America, Inc. v. Phillips,
173 F.3d 933 (4th Cir. 1999) 15
Howsam v. Dean Witter Reynolds, Inc.,
123 S. Ct. 588 (2002) 6
In re Cadillac V8-6-4 Class Action,
461 A.2d 736 (N.J. 1983) 21
Int'l Bhd. of Teamsters v. United States,
431 U.S. 324 (1977) 17
Jenkins v. Raymark Indu.,
782 F.2d 468 (5th Cir.1986) 12
Johnson v. West Suburban Bank,
225 F.3d 366 (3d Cir. 2000) 15
Leonard v. Terminix Int'l Co., L.P.,
2002 Ala. LEXIS 316 (October 18, 2002) 21
Lowery v. Circuit City Stores, Inc.,
158 F.3d 742 (4th Cir. 1998), *vacated and remanded on other grounds*, 527 U.S. 1031 (1999), *reaff'd, Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431 (4th Cir.), *cert. denied*, 531 U.S. 822 (2000) 18
Mastrobuono v. Shearson Lehman Hutton, Inc.,
514 U.S. 52 (1995) 6, 8
McDonald v. Washington,
862 P.2d 1150 (Mont. 1993) 21
Mitsubishi Motors Corp. v. Soler ChryslerPlymouth, Inc.,
473 U.S. 614 (1985) 6, 13, 14
Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.,
460 U.S. 1 (1983) 14
Murray v. United Food and Commercial Workers Int'l Union,
289 F.3d 297 (2d Cir. 2002) 15
National Center for Immigrant Rights v. INS,
743 F.2d 1365 (9th Cir. 1984), *vacated on other grounds*, 481 U.S. 1009 (1987) 18
Paige v. California,
102 F.3d 1035 (9th Cir. 1996) 18

Paladino v. Avnet Computer Technologies, Inc.,
134 F.3d 1054 (11th Cir. 1998) 16
Perry v. Thomas,
482 U.S. 483 (1987) 6, 10
Prima Paint Corp. v. Flood & Conklin Manufacturing Co.,
388 U.S. 395 (1967) 10
Robinson v. Metropolitan-North Commuter R.R. Co.,
267 F.3d 147 (2d Cir. 2001), *cert. denied*, 535 U.S. 951 (2002) 17
Sharpe v. Cureton,
319 F.3d 259 (6th Cir. 2003) 18
Southland Corp. v. Keating,
465 U.S. 1 (1984) 5, 6
State ex rel. Dunlap v. Berger,
211 W.Va. 549, 567 S.E.2d 265 (W. Va.), *cert. denied sub nom. Friedman's Inc. v. West Virginia*, 123 S. Ct. 695, 154 L. Ed. 2d 631 (2002) 21
Thiessen v. General Electric Capital Corp.,
267 F.3d 1095 (10th Cir. 2001), *cert. denied*, 122 S. Ct. 2614, 153 L. Ed. 2d 799 (2002) 17
Ting v. AT&T,
182 F. Supp. 2d 902 (N.D. Cal. 2002), *aff'd in relevant part*, 319 F.3d 1126 (9th Cir. 2003) 14
USA Check Cashers of Little Rock, Inc. v. Island,
349 Ark. 71, 76 S.W.3d 243 (Ark. 2002) 21
Vasquez v. Superior Court,
4 Cal. 3d 800 (1971) 21
Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University,
489 U.S. 468 (1989) 6, 8, 9, 10
Zepeda v. INS,
753 F.2d 719 (9th Cir. 1983) 18

2. Statutes and Rules

Age Discrimination in Employment Act 11, 14, 15, 16
Americans with Disabilities Act 15
ERISA 15
Fair Labor Standards Act.....22
Family and Medical Leave Act.....2
Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq*.....*passim*
Pregnancy Discrimination Act.....2
Title VII of the Civil Rights Act of 1964 15
Truth in Lending Act.....15
42 U.S.C. § 1981 .....15, 16
Rule 23, Fed. R. Civ. Pro. 11, 12, 20, 22
Rule 23(f), Fed. R. Civ. Pro. 22

3. Treatises and Law Reviews

Blume, *The "Common Questions" Principle in the Code Provision for Representative Suits*, 30 MICH. L. REV. 878 (1932) 9
Blume, *Jurisdictional Amount in Representative Suits*, 15 MINN. L. REV. 501 (1931) 9
CHAFEE, SOME PROBLEMS OF EQUITY (1950) 9
Davies, *Federal Civil Rights Practice In The 1990's: The Dichotomy Between Reality And Theory*, 48 HASTINGS L.J. 197 (1997) 21
Developments in the Law—Multiparty Litigation in the Federal Courts, 71 HARV. L. REV. 874, 928–41 (1958) 9
Gordon, *The Common Question Class Suit Under the Federal Rules and in Illinois*, 42 ILL. L. REV. 518 (1947) ...9
Note, *Action Under the Codes Against Representative Defendants*, 36 HARV. L. REV. 89 (1922).....9
RESTATEMENT (2D) OF CONTRACTS, § 204, comment d 7

Sternlight, *As Mandatory Binding Arbitration Meets The Class Action, Will The Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000) 20
STREET, 1 FEDERAL EQUITY PRACTICE (1909) 9
Wheaton, *Representative Suits Involving Numerous Litigants*, 19 Cornell L.Q. 339 (1934) 9
7A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 1751 (1986) 20
7A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 1778 (Supp.1983) 21
7B WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 1782 (1986) 20
Yeazell, *From Group Litigation to Class Action: Part II: Interest, Class, and Representation*, 27 UCLA L. REV. 1067 (1980) 9

STATEMENT OF INTEREST[1]

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a tax-exempt, nonprofit civil rights organization, founded in 1963 by the leaders of the American Bar, at the request of President Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. It has independent local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington, D.C. Through the Lawyers' Committee and its affiliates, hundreds of attorneys have represented thousands of clients in civil rights cases across the country, including a large number of cases challenging racial discrimination in employment.

The National Association for the Advancement of Colored People (NAACP), established in 1909, is the nation's oldest civil rights organization. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social and economic status of minority groups; the elimination of prejudice; the publicizing of adverse effects of discrimination; and the initiation of lawful action to secure the elimination of age, racial, religious and ethnic bias.

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[1] Written consent to the filing of this brief has been obtained from the parties in accordance with Supreme Court Rule 37.3(a). Copies of the consent letters have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, the amici state that this brief was not authored in whole or part by counsel for any party and that no party or entity, other than the amici and their counsel, made any monetary contribution to its preparation or submission.

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit corporation formed to assist African Americans in securing their constitutional and statutory rights through the prosecution of lawsuits, including class actions, and to provide legal services to African Americans suffering injustice by reason of racial discrimination.

The National Asian Pacific American Legal Consortium ("NAPALC") is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. Collectively, NAPALC and its Affiliates the Asian Law Caucus and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education on discrimination issues. NAPALC and its Affiliates have a long-standing interest in addressing matters of discrimination that have an impact on the Asian Pacific American community, and this interest has resulted in NAPALC's participation in a number of amicus briefs before the courts.

The National Partnership for Women & Families ("National Partnership") is a national advocacy organization that develops and promotes policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. Since its founding in 1971, the National Partnership (formerly the Women's Legal Defense Fund) has worked to advance equal employment opportunities by monitoring agencies, EEO enforcement, challenging employment discrimination in the courts, and leading efforts to promote employment policies such as the Family and Medical Leave Act and the Pregnancy Discrimination Act.

Women Employed is a national membership association of working women based in Chicago, with a membership of 2000. Since 1973, the organization has assisted thousands of working women with problems of discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts.

One of the principal objectives of amici is to protect the ability of minorities, women, and the poor to obtain effective civil redress for injuries, whether in arbitration or through the courts.

SUMMARY OF ARGUMENT

The South Carolina Supreme Court has examined and authoritatively construed the arbitration agreement used here pursuant to general principles of state law, and has found that it does allow the arbitration of class claims. Its determination of state law and construction of the contract should not be subject to further review by this Court.

Petitioner's argument that the Federal Arbitration Act creates a default rule, overriding state contract law and forbidding arbitration of class claims where the arbitration agreement is silent, has no basis in the text or policy of the statute, and would constitute a judicial rewriting of the statute. The decision below advances the policy of the FAA, and was sound.

The FAA authorizes only a simple change of forum, without the loss of any substantive right under state or federal law. This Court has recognized that the right of the EEOC to bring an action seeking relief for a charging party is a substantive right, and that excessive costs may

jeopardize substantive rights by effectively precluding resort to arbitration. The ability of a private party to litigate a claim effectively is no less a substantive right. In select cases, the ability to proceed collectively may likewise be essential to vindicate effectively a substantive right.

Class treatment is sometimes essential to the enforcement of the civil rights laws. Proof of a pattern of discrimination may be critical to victims' ability to prevail. The additional discovery in class proceedings is often necessary in order to prove the pattern and to establish a structure whereby victims can be identified and made whole. Finally, broad injunctive relief is often necessary to eradicate discrimination, but may be unavailable outside the context of a class proceeding. Additionally, as this Court and commentators have often observed, class treatment is also essential to the vindication of class members' rights where the amounts at stake are too small to justify individual litigation. Even with the benefit of fee-shifting statutes, these cases are economically less desirable than cases in which substantial recoveries or broad injunctive relief are at stake. A blanket rule prohibiting class based arbitration accordingly would have a detrimental impact on the ability of victims of civil rights violations and plaintiffs with small monetary statutory claims from having their substantive rights vindicated.

For these reasons, if a class claim cannot be litigated in arbitration but class treatment is important to the prosecution of the claim, such as in civil rights cases and small-recovery cases, claimants must be allowed to litigate their claims in court.

ARGUMENT

A. The South Carolina Supreme Court's Decision Respects this Court's Precedents Under the Federal Arbitration Act and, Accordingly, Is Not Subject to Further Review

The present case involves the South Carolina Supreme Court's application of South Carolina's contract law to a claim in arbitration founded on South Carolina's consumer law. *Bazzle v. Green Tree Financial Corp.*, 351 S.C. 244, 265, 569 S.E.2d 349, 360 (2002) Resolution of this matter in respondent's favor entails a straightforward application of this Court's established jurisprudence applying state-law contract law to interpret the scope of arbitration under the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* ("FAA"). Green Tree, however, petitions the Court to create a new, preemptive rule of contract construction, barring class arbitration unless explicitly commanded by the written instrument. Because this rule lacks any basis in the FAA or this Court's decisional law, Green Tree's argument ought to be rejected and the South Carolina Supreme Court's judgment affirmed.

The role of state law under the Federal Arbitration Act is an enduring, if troubled, theme of the Court's recent FAA cases. Nearly twenty years ago, in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), the Court held that the FAA applies in proceedings in state courts and preempts contrary state anti-arbitration laws. The Court has had repeated encounters with the preemption issue, but the path of the law has been questioned. In *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995), the Court considered the issue anew, and while *Southland* was reaffirmed, three separate opinions urged that the holding in *Southland* was in error and that the FAA should not be deemed preemptive. *Id.* at 282 (O'Connor, J. concurring); *id.* at 284 (Scalia, J., dissenting);

id. at 285 (Thomas, J., dissenting).[2]

Yet side-by-side with these cases, the Court has held unanimously that state—not federal—contract law governs the interpretation of arbitration agreements. *See, e.g., First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (to decide "whether the parties agreed to arbitrate a certain matter," courts apply "ordinary state-law principles that govern the formation of contracts"); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62–63 (1995) (applying New York and Illinois law); *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 475–76 (1989) ("general state-law principles of contract interpretation [apply] to the interpretation of an arbitration agreement within the scope of the Act"); *Perry v. Thomas*, 482 U.S. 483, 492 (1987) ("state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally") (emphasis in original). Although the parties' intent controls regarding whether they agreed to arbitrate a particular dispute, determining their intent is a question for the court to decide. *Howsam v. Dean Witter Reynolds, Inc.*, 123 S. Ct. 588, 592 (2002); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). Especially when interpretation of the contract arises from the state's highest court, its ruling deserves special deference. *See, e.g., Mastrobuono*, 514 U.S. at 60 n.4 (citing to *Volt*

[2] *See also Circuit City Stores, Inc. v. Adams*, 532 U.S 105, 122 (2001) (acknowledging that "[n]ot all of the Justices who join today's holding agreed with *Allied-Bruce*"); *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 689 (1996) (Thomas, J., dissenting "for the reasons given in my dissent last Term in *[Allied-Bruce]*"); *Perry v. Thomas*, 482 U.S. 483, 493–94 (1987) (Stevens and O'Connor, J.J., dissenting) (doubting the original outcome in *Southland*).

Info).

This is a classic "missing-term" case. Green Tree's arbitration contract form by all accounts fails to address class arbitration. As the Court noted last Term, courts have taken varying approaches to filling missing terms in contracts. *Barnes v. Gorman*, 122 S. Ct. 2097, 2102 (2002) ("Some authorities say that reasonably implied contractual terms are those that the parties would have agreed to if they had adverted to the matters in question. *See* 2 Farnsworth, *supra*, § 7.16, at 335, and authorities cited. More recent commentary suggests that reasonably implied contractual terms are simply those that 'compor[t] with community standards of fairness,' RESTATEMENT (SECOND) OF CONTRACTS § 204, Comment d; *see also* 2 Farnsworth, supra, § 7.16, at 334- 336."). The FAA nowhere dictates a rule for filling in missing terms about either the scope or process of arbitration.

To supply the missing term here, the South Carolina Supreme Court applied its own default rule, applicable to contracts generally, construing silence in the contract against the drafter (Green Tree):

> [U]nder general principles of contract interpretation, we construe Green Tree's omission of any reference to class actions against them. . . . No case law or statute in South Carolina prohibits class-wide arbitration. To the contrary, this Court strongly favors arbitration and has held that a state court may order consolidation of claims subject to mandatory arbitration without any contractual or statutory directive to do so.

Bazzle, 351 S.C. at 265, 569 S.E.2d at 360 (citations and footnote omitted). The South Carolina Supreme Court

adopted the same course that this Court took to construe a doubtful choice-of-law clause in *Mastrobuono*, 514 U.S. at 62-63 (applying "the common-law rule that a court should construe ambiguous language against the interest of the party that drafted it").[3]

Because the South Carolina high court's application of its own contract law lies beyond this Court's review, there remains nothing more for the Court to decide. *See, e.g., Volt Info*, 489 U.S. at 474 ("[a]ppellant acknowledges, as it must, that the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review"). Yet Green Tree makes an effort here to obtain *de novo* review. Its oft-stated contention that the use of terms such as "you," "us," and "this contract" in the agreement preclude class arbitration (Pet. Br. at 38-44) just attempts to resurrect before this Court the state law arguments rejected by the South Carolina Supreme Court. It disregards the state court's conclusion that Green Tree's form language, including the terms cited, "at best . . . creates an ambiguity." *Bazzle*, 351 S.C. at 264, 569 S.E.2d at 359.

Green Tree's back-up argument—that the "arbitration agreement cannot bind non-representative class members who are not parties to the specific arbitration agreements upon which the *Bazzle* and *Lackey* proceedings were predicated" (Pet. Br. at 45)—likewise slights the findings below. Green Tree used a virtually identical form with all of the class members (*id.* at 264 n.18, 569 S.E.2d at 359), and so it was bound by contract to arbitrate with all of them, and all of them with Green Tree. *Id.* at 266, 569 S.E.2d at 360.

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[3] *See also Green Tree Financial Corp.-Ala. v. Randolph*, 531 U.S. 79, 95 n.1 (2000) (Ginsburg, J., concurring in part and dissenting in part) (Alabama applies "usage and custom" to fill missing contract terms, where contract did not specify division of forum fees). Petitioner's brief conspicuously omits any citation to *Randolph*.

No class member was dragooned into the proceeding. *Id.* at 269, 569 S.E.2d at 362 ("[t]he class members' rights appear to have been properly protected by the notice given to all of them"). If individual consumers did not wish to arbitrate their claim under the form, they were permitted to opt out of the proceeding. *Id.* at 250, 569 S.E.2d at 352. The decision below is thus insulated from review.

B. The FAA Provides No Default Rule Prohibiting Class Arbitration And Which Supersede State-Law Principles Of Contract

Petitioner also claims that the FAA interposes a mandatory, federal default rule[4] that bars class arbitration unless expressly authorized. Yet the FAA authorizes enforcement of arbitration contracts only upon their own terms, and this contract, as duly construed by the South Carolina courts, authorizes class arbitration. *See, e.g., First Options*, 514 U.S. at 947 ("basic objective" of FAA is to enforce contracts "according to their terms"); *Volt Info*, 489 U.S. at 476 (federal policy under FAA "is simply to ensure

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[4] Congress wrote no exclusion of class treatment into the FAA, although class actions existed at the time the FAA was enacted. CHAFEE, SOME PROBLEMS OF EQUITY (1950) at 220–42; 1 STREET, FEDERAL EQUITY PRACTICE (1909) § 552; Blume, *The "Common Questions" Principle in the Code Provision for Representative Suits*, 30 MICH. L. REV. 878 (1932); Blume, *Jurisdictional Amount in Representative Suits*, 15 MINN. L. REV. 501 (1931); Yeazell, *From Group Litigation to Class Action: Part II: Interest, Class, and Representation*, 27 UCLA L. REV. 1067 (1980); *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 928–41 (1958); Note, *Action Under the Codes Against Representative Defendants*, 36 HARV. L. REV. 89 (1922); Wheaton, *Representative Suits Involving Numerous Litigants*, 19 Cornell L.Q. 339 (1934); Gordon, *The Common Question Class Suit Under the Federal Rules and in Illinois*, 42 ILL. L. REV. 518 (1947). There is no basis for any contention that Congress was unaware of the possibility of class treatment, or intended *sub silentio* to establish any special rule of the type for which petitioner contends.

the enforceability, according to their terms, of private agreements to arbitrate"); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) ("the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so"). Silence is not a basis on which this Court has previously incorporated optional terms into agreements.[5]

The FAA contains no express terms curbing the availability of class arbitrations under state law. Indeed, as a general matter, "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Info*, 489 U.S. at 477. The FAA preempts state law only "to the extent that it actually conflicts with federal law—that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at 477–78 (*quoting Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

More particularly, "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Volt Info*, 489 U.S. at 476. *See also Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) (state rule governing "efficient order of proceedings" may be enforced).

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5 This Court has been cautious when the arbitration agreement is silent on a key term. *See, e.g., EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (refusing to read into silent agreement a term precluding administrative relief of civil rights claim); *Randolph*, 531 U.S. at 90–91 (declining to read into silence a term on the division of forum fees); *Perry*, 482 U.S. at 492 (remanding, rather than deciding, issue of whether employees could press "ancillary claims for conversion, civil conspiracy, and breach of fiduciary duty" in arbitration).

Green Tree complains that the state court's decision transformed its arbitration "into a massive proceeding with millions of dollars at stake and the full trappings of the process under Rule 23" (Pet. Br. at 32). Mere generic attacks on the "practical problems associated with class arbitration," as Green Tree argues (Pet. Br. at 17, 38-42), will not suffice to meet this burden. *See, e.g., Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (party seeking to avoid arbitration on ground of undue expense has burden to establish factual record and cannot rely on generalities); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) (rejecting "generalized attacks" on the arbitration process as applied to a broker's ADEA claim). Surely, petitioner cannot claim prejudice in the fact that the clearly meritorious claims of numerous persons with whom they had agreements were heard and determined. The fact that many such persons might not have asserted a claim in the absence of class treatment is not a legally cognizable burden. Petitioner has made no record showing that it was more expensive or time-consuming to adjudicate the rights of class members in the class arbitral proceeding than in a large number of individual proceedings involving the same common questions, and it would not be reasonable to entertain such an assumption in the absence of evidence.

If anything, the decision below advances rather than retards FAA objectives. *Bazzle*, 351 S.C. at 266, 569 S.E.2d at 361. Class treatment of common issues holds mutual benefits for claimants and respondents. Economies of scale save attorneys' fees and resources that would otherwise be squandered defending numerous individual arbitrations over the same issue. And resolution of a class action in a defendant's favor brings global closure to a disputed issue. *See Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177, 185 (4th Cir. 1993) ("Findings in a common issues trial on even a few of the eight identified questions may

eventually save considerable time and judicial resources. Significant economies may be achieved by relieving educational institutions of the need to prove over and over when defendants knew or should have known of asbestos' hazards, or whether defendants engaged in concerted efforts to conceal this knowledge, or even whether certain of defendants' products crumble and release dust under hand pressure."); *Jenkins v. Raymark Indus.*, 782 F.2d 468, 472 (5th Cir. 1986) ("To the extent defendants win, the elimination of issues and docket will mean a far greater saving of judicial resources. Furthermore, attorneys' fees for all parties will be greatly reduced under this plan, not only because of the elimination of so much trial time but also because the fees collected from all members of the plaintiff class will be controlled by the judge."). There is no cause to believe that such advantages would not attend a well-managed class arbitration.

This Court has refused to construe even statutory language discussing individual litigation as creating a presumption against class litigation, holding that Congress would have to express such an intent clearly, because the courts will not infer an intent to exempt particular causes of action from the normal rules of civil procedure, including Rule 23. *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979). Because the FAA is intended to provide only for a change of forum, it would be similarly inappropriate to create a default rule foreclosing a particular manner of litigation.

C. Independently of State Contract Law, the FAA Authorizes Only a Simple Change of Forum, Without the Loss of Any Substantive Right

Although this particular case may be resolved according to state law, the federal FAA itself conveys a separate, substantive, and independent limitation on

arbitration agreements and their interpretation: that they not impede a claimant from effective vindication of federal or state statutory rights. This Court traced the dividing line in *Waffle House*:

> We have held that federal statutory claims may be the subject of arbitration agreements that are enforceable pursuant to the FAA because the agreement only determines the choice of forum. "In these cases we recognized that '[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.' [*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S. Ct. 3346, 87 L.Ed.2d 444 (1985)]." *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991).

534 U.S. at 295 n.10. Twice in recent Terms, the Court recognized circumstances where the FAA would not compel enforcement of arbitration agreements that invaded a claimant's ability to vindicate substantive rights. In *Waffle House*, the Court held that this principle would preclude judicial construction of "an employee's agreement to submit his claims to an arbitral forum as a waiver of the substantive statutory prerogative of the EEOC to enforce those claims for whatever relief and in whatever forum the EEOC sees fit." *Id.* at 295. And in *Randolph*, 531 U.S. at 90, the Court stated, "[i]t may well be that the existence of large arbitration costs could preclude a litigant ... from effectively vindicating her federal statutory rights in the arbitral forum." The principle that enforceable arbitration agreements do not involve the waiver of substantive rights applies with equal

force to state statutory claims.[6]

The adequacy of procedures in arbitration is considered on a case-by-case basis. *See, e.g., Randolph*, 531 U.S. at 92; *Gilmer*, 500 U.S. at 33 (claims of procedural inadequacies "best left for resolution in specific cases"). Thus, regarding the availability of class actions, there will be cases where—upon inquiry into the particular arbitration clause and facts of the case—the class procedure may be integral to a claimant's vindication of a cause of action in arbitration. *See, e.g., Bailey v. Ameriquest Mortg. Co.*, No. CIV. 01-545 (JRT/FLN), 2002 WL 100391, 145 Lab. Cas. ¶ 34,473 (D. Minn. Jan 23, 2002) (finding that collective action was integral to relief in FLSA case: "when all the procedural hurdles contained in the Agreement are considered together—the need to travel to defendant's forum, pay half the costs of the arbitrator, proceed individually rather than collectively, and the limitation of damage recovery, the likely result is obvious: the cost of bringing the claim will quickly outweigh any potential recovery under the Act"); *Ting v. AT&T*, 182 F. Supp. 2d 902, 933 (N.D. Cal. 2002) (under California consumer statute, court found that the contract's restrictions on damages that a successful plaintiff could obtain, and prohibition on joinder of claims through class actions to be unconscionable, because they deprived retail customers of a meaningful remedy), *aff'd in relevant part*, 319 F.3d 1126 (9th Cir. 2003).[7] Any decision in this case must avoid

[6] *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983) (discussing § 2 of the FAA in a state-law contract case, the Court stated: "The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act."); *Mitsubishi*, 473 U.S. at 619–20, involved state as well as federal statutory claims.

[7] Regarding the availability of a class or collective action in arbitration, *Gilmer* came closest to this issue when it addressed collective actions in the ADEA context. 500 U.S. at 32. While holding that the absence of these mechanisms does not inherently preclude arbitration in every ADEA case, the Court also observed that the NYSE rules under review in fact provided for collective proceedings. *Id.*

trammeling on the future case-by-case development of this issue under the FAA.

Those courts that have held that the right to class treatment can be waived have failed to consider or honor the limitation of the FAA that arbitration agreements not impede a claimant from effective vindication of federal or state statutory rights. They generally hold that the parties to an arbitration agreement are free to bargain away judicial remedies, and do not consider—or reject out of hand—the importance of class actions and other judicial remedies to the statutory scheme, and whether the rights in question can be effectively vindicated in the absence of class treatment.[8] This standardless approach is particularly risky in light of the fact that a number of companies have been judicially determined to have crafted agreements or rules that were intended to give them an edge in arbitration they would not be allowed in court, or that precluded remedies that would be available in court.[9]

[8] *E.g., Johnson v. West Suburban Bank*, 225 F.3d 366, 377 (3d Cir. 2000) (right to seek $500,000 in statutory TILA damages lost in absence of class treatment, but "simply because judicial remedies are a part of a law does not mean that Congress meant to preclude parties from bargaining around their availability"), *cert. denied*, 531 U.S. 1145 (2001); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002) (same); *Randolph v. Green Tree Financial Corp.-Ala.*, 244 F.3d 814, 817–18 (11th Cir. 2001) (even though class actions are important tool under TILA, they can be waived in agreement).

[9] *E.g., Brooks v. Travelers Insurance Co.*, 297 F.3d 167, 170–71 (2d Cir. 2002) (ADEA, ADA, and ERISA); *Murray v. United Food and Commercial Workers International Union*, 289 F.3d 297, 304 (2d Cir. 2002) (Title VII, 42 U.S.C. § 1981); *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999) (Title VII); *Ferguson v. Countrywide Credit Industries, Inc.*, 298 F.3d 778, 786 (9th Cir. 2002) (Title VII); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 891 (9th Cir. 2002)

D. Some Claims Require Class Treatment to Vindicate Statutorily Protected Substantive Rights

1. Class Litigation Is Sometimes Essential to the Enforcement of the Civil Rights Laws

Many individual civil rights actions can fairly be resolved on the basis of facts unique to the claim in question, without any plausible contention that a pattern of discrimination is involved. However, class treatment where there is such a pattern is often essential to vindicate civil rights, from at least three perspectives. First, it enables plaintiffs to obtain the evidence necessary to show a pattern of discrimination going beyond the isolated facts particular to that individual claim. Second, it enables plaintiffs to use the types and scale of proof necessary to show such patterns and to establish a structure by which victims can be identified and obtain relief. Third, one of the principal aims of civil rights actions is the eradication of discrimination, but broad injunctive relief is often unavailable outside the context of a class action.

In *Gilmer*, the New York Stock Exchange rules provided for class arbitrations and allowed awards of equitable relief. This Court accordingly rejected petitioner's argument that his arbitration agreement was unenforceable in that it did not provide for broad equitable relief and collective actions. The opinion observed that ADEA cases can be conciliated individually and that the EEOC can bring class actions. 500 U.S. at 32. That statement does not speak to the fundamental question raised in this case, because petitioner's argument was abstract. He made no showing that he could not effectively vindicate his rights in a purely

(Title VII); *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1057–59 (11th Cir. 1998) (Title VII).

individual action.

The discovery necessary to prove a pattern of discrimination is generally unavailable in litigation of an individual claim. Far more discovery is generally allowed in class actions because of the complexity of the case, however, and this additional discovery is often necessary for plaintiffs to make the statistical and other showings that are critical to proving a classwide pattern of discrimination.

Obtaining a just outcome can depend entirely on proof of a discriminatory pattern. For this reason, this Court has identified pattern and practice cases as having unique methods of proof affecting all persons subject to the challenged practice. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 32 (1977). Thus, statistical and other evidence is available to prove such patterns of discrimination. Once such a pattern is established, it creates a rebuttable presumption that each class member was victimized by the discrimination, shifting to defendants the burden of persuasion to establish the contrary.[10]

There is no effective substitute for this classwide approach, because it permits the vindication of rights of persons who were harmed by discrimination but are not aware of it,[11] or courts may refuse to take evidence of

[10] *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 361–62 (1977); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 772–73 (1976); *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 875–76 (1984); *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 168 (2d Cir. 2001), *cert. denied*, 535 U.S. 951 (2002); *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095, 1106 (10th Cir. 2001) ("significant advantage" in ADEA collective action), *cert. denied*, __ U.S. __, 122 S. Ct. 2614, 153 L. Ed. 2d 799 (2002).

[11] The Fourth Circuit has observed that "sophisticated general policies and practices of discrimination are not susceptible to such precise delineation by a layman who is in no position to carry out a full-fledged investigation himself," although "[l]ong observation of plant

patterns of discrimination into account outside the context of a class action.[12]

Moreover, even if individual plaintiffs prove pervasive discrimination, the absence of class certification jeopardizes or bars the kind of systemic injunction that will prevent future wrongs. Many courts have held that broad injunctive relief is prohibited to the extent that it exceeds what is needed to give individual relief to the named plaintiffs.[13]

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practice may bring the realization that he and his black coemployees are not getting anywhere." *Graniteville Co. (Sibley Division) v. EEOC*, 438 F.2d 32, 38 (4th Cir. 1971).

[12] For example, even where plaintiffs obtain such evidence because of an earlier unsuccessful effort to obtain class certification, and as many as 206 plaintiffs gather together into a consolidated case, one Circuit has held that plaintiffs could not rely on evidence of the pattern of discrimination in litigating their claims because no class had been certified, and then affirmed the dismissal of all 206 plaintiffs' individual claims. *Allison v. Citgo Petroleum Corp*, 151 F.3d 402 (5th Cir. 1998), *reh'g denied with explanation*, 151 F.3d 434 (5th Cir. 1998), followed by *Celestine v. Petroleos de Venezuela SA*, 266 F.3d 343, 355–56 (5th Cir. 2001) (same case). In effect, the denial of class certification blinded the court to the type of evidence that was dispositive in *Teamsters*.

[13] *E.g.*, *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *Brown v. Trustees of Boston University*, 891 F.2d 337, 361 (1st Cir. 1989), *cert. denied*, 496 U.S. 937 (1990); *Ameron, Inc. v. U.S. Army Corps of Engineers*, 787 F.2d 875, 888 (3d Cir. 1986), *approved on rehearing*, 809 F.2d 979, 982 n.1 (3d Cir. 1986), *cert. dismissed*, 488 U.S. 918 (1998); *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 766–67 (4th Cir. 1998), *vacated and remanded on other grounds*, 527 U.S. 1031 (1999), *reaff'd*, *Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 437 (4th Cir.), *cert. denied*, 531 U.S. 822 (2000); *Hollon v. Mathis Independent School District*, 491 F.2d 92, 93 (5th Cir. 1974) (*per curiam*); *Sharpe v. Cureton*, 319 F.3d 259, 273 (6th Cir. 2003); *Butler v. Dowd*, 979 F.2d 661, 674 (8th Cir. 1992), *cert. denied*, 508 U.S. 930 (1993); *Zepeda v. INS*, 753 F.2d 719, 727–29 (9th Cir. 1983); *Nat'l Center for Immigrant Rights v. INS*, 743 F.2d 1365, 1371–72 (9th Cir. 1984), *vacated on other grounds*, 481 U.S. 1009 (1987); *Bresgal v. Brock*, 843 F.2d 1163, 1170–71 (9th Cir. 1987); *Paige v. California*, 102

Nor would the EEOC be able to fill the void that would be left if employers required their employees to sign arbitration agreements that excluded class treatment, and if this Court held that such agreements would be effective even where class treatment is necessary to vindicate statutory rights. As this Court recognized in *Waffle House*, the EEOC has never been able to bring more than a small fraction of the enforcement cases filed annually,[14] and the primary burden of enforcing Title VII has since the beginning been on private plaintiffs.

2. Some Claims Are Too Small to Litigate Effectively on an Individual Basis, Even With the Benefit of Fee Awards

"Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device." *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). This Court has recently reaffirmed this perception. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997), stated that "the policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor (citations omitted)."

Small-claim recoveries are not limited to consumer cases. For example, employment discrimination cases involving denials of promotion ordinarily involve smaller

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F.3d 1035, 1039 (9th Cir. 1996).

[14] *EEOC v. Waffle House*, 534 U.S. at 290 n.7.

back pay claims than hiring and discharge cases.

In all areas of the law, it is difficult for persons with small monetary claims to find capable counsel. Even with fee-shifting statutes, these cases remain economically less desirable than cases in which substantial recoveries or broad injunctive relief are at stake.

Class actions are for all these reasons commonly seen as indispensable to the goals of Congress in enacting many causes of action. In perhaps the most extensive employment discrimination treatise in common use, Prof. Larson stated: "It now is apparent that the increasing complexity and urbanization of modern American society has tremendously magnified the importance of the class action as a procedural device for resolving disputes affecting numerous people. Nowhere is this more evident than in the context of the increased number of actions involving the federal government, labor unions, business and nonprofit associations, civil rights, and consumer groups."[15] Profs. Wright, Miller, and Kane state: "Another important factor indicating the superiority of a Rule 23 action in the consumer protection field is that typically the individual claims are for small amounts, which means that the injured parties would not be able to bear the significant litigation expenses involved in suing a large corporation on an individual basis."[16] State courts have also recognized this reality.[17]

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[15] 7A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 1751 at 14–15 (1986) (footnotes omitted).

[16] 7B WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 1782 at 59 (1986); *see also* Jean Sternlight, *As Mandatory Binding Arbitration Meets The Class Action, Will The Class Action Survive?*, 42 WM. & MARY L. REV. 1, 9 (2000) ("The potential defendants know that because many claims are not viable if brought individually, plaintiffs will often drop or fail to initiate claims once it is clear that class relief is unavailable" (footnote omitted), and noting that

in a multi-year period since First USA required its customers to sign arbitration agreements, only four customers had made claims against it, while during the same period it invoked arbitration to resolve 51,622 claims against customers); Julia Davies, *Federal Civil Rights Practice In The 1990's: The Dichotomy Between Reality And Theory*, 48 HASTINGS L.J. 197, 236 (1997) ("Despite the existence of individual attorneys whose choice of cases is driven more by ideological commitment than money, the plaintiffs' damages were a factor many survey participants viewed as extremely important in determining what cases they wanted to accept.") (footnote omitted).

[17] *See, e.g.*, *USA Check Cashers of Little Rock, Inc. v. Island*, 349 Ark. 71, 76 S.W.3d 243 (Ark. 2002) (potential recovery to each member of class expected to be relatively small and would not justify contingency fee cases nor cases in which attorneys charge on an hourly basis); *Daar* v. *Yellow Cab Co.*, 67 Cal. 2d 695, 715, 433 P.2d 732 (Cal. 1967) ("It is more likely that, absent a class suit, defendant will retain the benefits from its alleged wrongs."); *Vasquez v. Superior Court*, 4 Cal. 3d 800 (1971) ("Individual actions by each of the defrauded consumers is often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action; thus an unscrupulous seller retains the benefits of its wrongful conduct."); *McDonald v. Washington*, 862 P.2d 1150 (Mont. 1993) ("The *Green* court also put into perspective the need for class actions and the type of case which is best litigated as a class action: Equity has long recognized that there is need for a course which would redress wrongs otherwise unremediable because the individual claims involved were too small, or the claimants too widely dispersed . . . In the instant case, the claims involved would be unremediable without class action status because most are minor in and of themselves.") (citation omitted); *In re Cadillac V8-6-4 Class Action*, 461 A.2d 736 (N.J. 1983) ("[I]ndividual actions or a test case may be an inferior alternative to the class action when the economics of the situation make it impossible for the aggrieved members to vindicate their rights by separate actions.") (quoting 7A Wright, Miller & Kane, FEDERAL PRACTICE & PROCEDURE § 1778 (Supp.1983)). *See also Leonard v. Terminix Int'l Co., L.P.*, 2002 Ala. LEXIS 316 (October 18, 2002) ("This arbitration agreement is unconscionable because it is a contract of adhesion that restricts the Leonards to a forum where the expense of pursuing their claim far exceeds the amount in controversy. The arbitration agreement achieves this result by foreclosing the Leonards from an attempt to seek practical redress through a class action and restricting them to a disproportionately expensive individual arbitration."); *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 567 S.E.2d

3. If a Claim Cannot Be Litigated on a Class Basis in Arbitration, and if Class Treatment is Important to the Prosecution of the Claim, as in Civil Rights and Small-Recovery Cases, Claimants Must Be Allowed to Litigate Their Claims in Court

In the event that a company-drafted arbitration agreement expressly precludes class treatment, or is silent on class treatment and state contract law does not require class treatment, and class treatment is important to the vindication of the claim, there are a number of means of protecting the rights of claimants. One is to do as the lower courts did here, exercising judicial responsibility over the question of class certification and requiring the arbitral process to resolve the merits. Another would be to require the arbitrator to consider whether to certify the class, using the same standards the courts would follow.[18] A third would be to exempt the controversy from the arbitration agreement and have the courts determine the individual and class claims, with the individual claims subject to remand to arbitration in the event that class certification is denied.[19] Any approach

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265, 278–79 (W. Va.) ("Thus, in the contracts of adhesion that are so commonly involved in consumer and employment transactions, permitting the proponent of such a contract to include a provision that prevents an aggrieved party from pursuing class action relief would go a long way toward allowing those who commit illegal activity to go unpunished, undeterred, and unaccountable."), *cert. denied sub nom. Friedman's Inc. v. West Virginia*, 123 S. Ct. 695, 154 L. Ed. 2d 631 (2002).

[18] Federal standards under Rule 23 or, in appropriate cases, collective-action standards under the Fair Labor Standards Act, would be appropriate in cases arising under Federal law and in cases that would if filed in court be removable to the Federal courts. State class action standards would be appropriate for non-removable cases arising under State law.

[19] The availability of Rule 23(f), to test the decision whether to certify the class, is an important assurance of fairness under this approach.

would be sufficient if it preserves the opportunity for consideration of class certification under the standards used by the courts.

CONCLUSION

For the reasons stated above, the decision of the South Carolina Supreme Court should be affirmed.

Respectfully submitted,

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